Verena Steller, University of Frankfurt
verena.steller@normativeorders.net

‚Changing Places': The Rule of Law in British India. A Proposal[1]

In August 1870, the High Court of Calcutta, presided by Justice Norman, heard the case of Ameer Khan[2]: Ameer Khan, a Muslim merchant aged 75, had been arrested in his house in Calcutta a year before and incarcerated outside the jurisdiction of the High Court in a provincial jail. Some days later he had been transferred to a jail in Calcutta without any legal assistance and without being informed about what the accusation was. At the beginning of August 1870, Justice Norman received Ameer Khan's petition of *habeas corpus*, which was addressed to the Super Intendant of the Alipor Jail „commanding him to bring before the Court the body of Ameer Khan."[3] During this first year of incarceration, Ameer Khan had repeatedly tried to submit a petition to the General Governor and the Vice-Governor of Bengal in order to be informed about the reasons of his imprisonment. All he received was the answer that he had been arrested according to the *Bengal Regulation Act III* of 1818 which enabled the Governor to arrest suspects in case of threat to public safety without the obligation to give reasons.[4] In his petition to the High Court, Ameer Khan emphasized "that he was a true and loyal subject of Her Britannic Majesty, and that he had never conspired with her enemies, or consorted or been in league with any person or persons, who had for their object the intention of disturbing tranquillity in the territories of Native Princes entitled to the protection of the British Government, or of imperilling the security of the British Dominions by foreign hostility, or by internal commotion." [5]

Albert V. Dicey, the eminent contemporary authority of British constitutional law, defined *habeas corpus* in his "Introduction to the Study of the Law of the Constitution" (1885) in the chapter on the rule of law as follows: It represented the adequate legal means to enforce the "right to personal liberty", i.e. "a person's right not to be subjected to

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[1] Revision of a paper presented at the Interdisciplinary Graduate Conference on the Middle East, South Asia and Africa, April 15-17, 2010, and proposal of a research project on "Imperial justice? Free Trade on Trial: justification narratives and experiences of (in)justice in British colonies in the 19th century", EXC 243 "The Formation of Normative Orders", at the University of Frankfurt.
[2] *Bengal Law Reports*, Vol. VI., p. 392, In the Matter of Ameer Khan, *Supplemental to the Weekly Reporter*, II, 609-640 (writ of habeas corpus) + 6 BLR, VI, 456 (bail).
[3] *BLR*, VI, p. 392.
[4] 34 Geo.III c.54.
[5] *BLR*, VI, p. 392.

imprisonment, arrest, or physical coercion in any manner that does not admit of legal justification".[6] In contemporary constitutional literature, *habeas corpus* has been considered as the most important legal instrument safeguarding individual freedom against arbitrary state action in the metropolis. In this case study, an Indian subject asserted his claim on *habeas corpus* and the *Rule of law* in the Indian colony in the High Court of Calcutta. In British self-perception, the English constitution and its political order resulted in the words of Albert V. Dicey, from 'innumerable battles' fought in the courtroom which proved to be a 'forum of good reasons' to discuss and determine the relation between subject and citizen, colony and metropolis. Therefore, my research project on imperial justice starts in the arena of the courtroom in India.

Indeed, the first writ of *habeas corpus* was issued in India as early as in 1775. Consequently, Ameer Khan's petition in 1870 did not represent a novelty in the application of *habeas corpus* in the Indian colony. Yet, his case coincided with a wide range of reform projects in the metropole which were decisive for the definition of governance and citizenship and for the interaction between metropolis and colony (i.e. the Reform Acts of 1832 and 1867). They fell in midst of firstly the Anglo-Indian law codifications and secondly the repercussions of the *Indian Mutiny* in 1857 and the Morant Bay Rebellion in Jamaica in 1865.

In addition, Ameer Khan's case was trialled in Calcutta, the presidency town of the province which the British thought to be governed best by the *Rule of law*. Yet, the British *Rule of law* in India was much less goal targeted than assumed. For even in the perception of contemporary administrators and legal experts the whole project had started as an "experiment" (Thomas Macaulay).[7] It was only in the second half of the nineteenth century that the *Rule of law* seems to have become what is was later to be considered, i.e. a celebrated monolithic legal theory and practice which took on a remarkable life of its own.

The presupposition of a purpose and goal targeted *Rule of law* often comes along with the idea that the transfer of the *Rule of law* to India represented just a simple application of English principles of law from the metropolis to the colony. But the English law was territorially bound, a 'province' of law, and stood for a combination of a legal form and discourse practice, a way of thinking, a style of legal reasoning deeply rooted in its sense of history, and an amalgam of cultural memory and constitutional culture.[8] As Albert V. Dicey

[6] Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885), London 2005, 203f.
[7] Stokes, Utilitarians.
[8] Mithi Mukherjee, "Justice, War, and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachement of Warren Hastings", In *Law and History Review*, 23, 2005, 589-630, paragraph 42.

suggested, the English law was "the most original creation of the English genius". To him, the *Rule of law* even represented a ‚byword' of the English.[9] The *Rule of law* was of paramount importance for the self-perception of 'Britishness'.[10] Its key role in British "imperial and missionary nationalism"[11] was re-inforced by the foundation of history as an academic discipline. Even if the idea of a monolithic *Rule of law* was challenged by the colonial encounter, it was at the same time affirmed by a professionalized jurisprudence and historiography. To use the historian Richard Cosgrove's words: "In Victorian England, especially after 1870, the development of a national narrative focused on constitutional history as its primary vehicle."[12]

Obviously, to contemporaries, the codification project of Anglo-Indian law seemed to be one of the answers to this colonial challenge, for codifications are part of the *statutory law* and are supposed to work off deficits. With regard to British India, the codification process also meant to come to terms with the deficits which resulted from the formation of the imperial normative order and *Rule of law* in the Indian colony itself.

Consequently, the application of British law in India was by no means a simple transfer, but a very complicated process of de- and re-territorialization[13] of 'living law[14]' - i.e. the re-embeddedment of a legal culture and its ‚order of things', which proved to be an immense challenge to the 'travelling culture' of law.

Recent studies deal with this problem of (re-)embeddedment and the application of the *Rule of law*. Especially legal historians as e.g. Rhadika Singha, Nasser Hussain, Jordanna Bailkin, Martin Wiener and Elizabeth Kolsky concentrate on the impact of the British legal system on the colonies and its dilemmas. [15] In contrast to these studies which refer to Michel

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[9] Albert V. Dicey, "Digby on the History of the English Law", *Nation* 21, 9.Dec. 1875, 373f; Wiener, *Empire on trial*, 9.

[10] Sandra den Otter, "A legislating Empire: Victorian political theorists, codes of law, and empire", In Bell, Duncan (eds.), *Victorian Visions of Global Order. Empire and International Relations in Nineteenth-Century Political Thought*. Cambridge 2007, 89-112.

[11] Krishan Kumar, "Nation and Empire: English and British Identity in Comparative Perspective", In *Theory and Society* 29, 2000, 575–608.

[12] Richard Cosgrove, "A Usable Past: History and the Politics of National Identity in Late Victorian England", In *Parliamentary History* 2008, 30-42, 30; Richard Cosgrove, Anthony Brundage, *The Great Tradition. Constitutional History and National Identity in Britain and the United States, 1870-1960*, Stanford 2007; Kumar, Nation and Empire, 589ff.

[13] Anthony Giddens, The consequences of modernity, Cambridge 1990, 17-29; Alexander C.T. Geppert, Uffa Jensen und Jörn Weinhold, Verräumlichung. Kommunikative Praktiken in historischer Perspektive, 1840-1930,

[14] Justice Louis D. Brandeis, "The Living Law", 10 *Ill. L. Rev*. 461 (1916).

[15] See the path braking studies by Nasser Hussain, *The jurisprudence of emergency: colonialism and the rule of law*. Ann Arbor 2003; Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law,* Cambridge 2010; R. W. Kostal, *A Jurisprudence of Power. Victorian Empire and the Rule of Law*, Oxford 2005; Radhika Singha, *A despotism of law. Crime and Justice in Early Colonial India*, Oxford 2000; Martin Wiener, *An empire on trial: race, murder, and justice under British rule, 1870-1935*. Cambridge 2009; Radhika Singha,

Foucault's "Discipline and Punish" for obvious reasons, I would like to have a look at the British rule of law in India with Foucault's *Heterotopia*:

Foucault defines "Other Places" as spaces which serve as "counter-sites" – i.e. places, in which orders are "simultaneously represented, contested, and inverted". The legal order was mirrored; thus tensions and paradoxa were made visible.[16] Ameer Khan's case in the High Court of Calcutta therefore serves as a starting point for some general considerations on the *Rule of law*.

Ameer Khan's *habeas corpus* petition gave rise to detailed comments: Justice Norman's explanations filled no less than 45 pages in the Bengal Law Reports – and represented virtually a "Best of", indeed a most impressive panorama of British constitutional history: Cited are the Magna Charta, the Petition of Right, the Bill of Rights, *Calvin's case*, *The King v. Wilkes*, *Entick v. Carrington*, *Sommersett's case* and even the Slavery Abolition Act. The Court negotiated core principles of the rule of law and common law to the Indian subcontinent.

When in 1775 the first writ of *habeas corpus* was to be issued in India, Chief Justice Elijah Impey had to decide whether the High Court had jurisdiction to hear cases involving the indigenous revenue collectors and *zamindars*, employees of the East India Company. Justice Impey sought to enforce the "fundamental principles of the king's justice" and to assert the prerogative of the judiciary with reference to Lord Coke's classical argument of the predominance of the rule of law to which even the sovereign had to defer. In a letter to the opposing General Governor Impey had declared: "... though the natives are without question under your general protection, they are more immediately under the laws. I have no doubt that the laws will be found to be in practice what they are universally esteemed in theory, a better security to the people than the discretionary power of any council."[17]

The ambivalence of the rule of law between protection and hegemony was obvious. On the one hand, acknowledging jurisdiction on the basis of habeas corpus meant to expand the claim of sovereignty to the colonial sphere. *Habeas corpus* represented a way to bind the Indian subject to British law.[18] On the other hand, in the courtroom as a forum of justification, debates about "allegiances" and "reciprocity" of the subject and sovereign took

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A despotism of law. Crime and Justice in Early Colonial India, Oxford 2000.

[16] Michel Foucault: Of Other Spaces (1967), Heterotopias. [<http://foucault.info./docuements/heteroTopia/foucault.heteroTopia.en.html>, [14.05.2010])

[17] Quoted by Hussain, *Jurisprudence of emergency*, 81f; Biswa Nath Pandey, *The Introduction of English Law into India. The Career of Elijah Impey*, London 1967, 176-195.

[18] Hussain, *Jurisprudence of emergency*, 81f.

place. This was also the case in the hearing of Ameer Khan. The impact of the Indian Mutiny was sensible, when the Counsel argued: "The right to the protection of a writ was to be considered a natural right of the king's subjects, one that defined allegiance, for as Lord Coke has argued in Calvin's case, protection and allegiance were reciprocal."[19] The Counsel alluded to the mandate and trusteeship which the British governance was also bound to fulfil in India – a reasoning which obviously impressed Justice Norman. [20]

However, Justice Norman objected that Parliament had the possibility to suspend *habeas corpus* in cases of precarious political conditions.[21] Norman thought about analogies between metropolis and colony. He saw a substantial difference only in the duration of the state of emergency which he considered to be of a temporary nature in England, but of a permanent nature in India. For that reason he found the suspension of *habeas corpus* by the Governor to be legitimate, which to his mind did not correspond to a suspension of the rule of law, but to a confirmation of the latter:[22]

"but, if the danger to be apprehended from the conspiracies of people […] is not temporary, but from the condition of the country must be permanent, it seems to me that the principles which justify the temporary suspension of the Habeas Corpus Act in England justify the Indian Legislature in entrusting to the Governor-General in Council an exceptional power of placing individuals under personal restraint when, for the security of the British dominions from foreign hostility, and from internal commotion, such a course might appear necessary to the Governor General in Council."[23]

It is amazing how arguments of the English constitutional debates of the 16th and 17th centuries concerning "reciprocity", "allegiance", "trust", the rule of law, fundamental rights, political liberties, and the democratic basis of political authority and legitimacy which had once unsettled the metropolis now resounded in the colonial context.[24] They recall the English struggle against the power of an absolute sovereign and hint at the potentially despotic

[19] *BLR*, 638f.
[20] "No man can study the history of England, or can read the great judgement passed by the High Court of Parliament by the Bill of Rights on King James II, without seeing that, on the faithful observance by the sovereign of the unwritten laws and constitution of the United Kingdom, as contained in the Great Charter and other Acts which I have mentioned, depend in no small degree on the allegiance of the subjects." Ibid.
[21] Cf. Act of Geo III, c. 70 (1781).
[22] Hussain, *Jurisprudence of emergency*, 94.
[23] *BLR*, 639f: "but, if the danger to be apprehended from the conspiracies of people […] is not temporary, but from the condition of the country must be permanent, it seems to me that the principles which justify the temporary suspension of the Habeas Corpus Act in England justify the Indian Legislature in entrusting to the Governor-General in Council an exceptional power of placing individuals under personal restraint when, for the security of the British dominions from foreign hostility, and from internal commotion, such a course might appear necessary to the Governor General in Council."
[24] J.M. Kelly, *A Short History of Western Legal Theory*, Oxford 1992, 207.

character inherent to the English constitution. Evidently, the form of colonial governance, the colonies' share in the social contract, the relation of *colonial rule,* and *the rule of law* were subject to discussion. It was also in the courtroom arena of British India that debates about prerogatives and limitations of colonial governance arose – topics of paramount importance for the constitution of the Empire which were to be discussed with an increasing fierceness testifying a radicalisation of the Rule of law in the last decades of the nineteenth century. [25]

At the same time, the 'jurisprudence of emergency' intensely concerned the public both in the metropolis and in the colony, attesting both a growing helplessness of the colonial administration and a visible radicalisation of the *Rule of law*. Law was according to James Fitzjames Stephen, one of the Law Commissioners, "the gospel of the English, and it is a compulsory gospel which admits of no dissent and no disobedience."[26] Fitzjames Stephens's remark on the compulsory character of the rule of law represents a kaleidoscope of the tensions between liberal ideals, myths, and the constraints of authoritarian governance, of the clashes between the *Rule of law* und arbitrary rule, equality/liberalism and inequality/authoritarianism.[27] When Fitzjames Stephen spoke of military power as the second pillar of British governance in India, the drift to "lawfare" as "legitimate use of penal powers, administrative procedures, states of emergency, mandates and warrants to discipline its subjects by means of violence" seemed to be evident.[28] Physical violence belonged to the traits inherent to colonial rule and to the *Pax britannica*.[29]

Lately, the legal anthropologists John and Jean Comaroff questioned the "millenial faith" of contemporary observers in the capacity of the law to pull a just, ethical policy, and social order out of the hat. Obviously, the proclamation of a new legal order signals a break with the past, its dilemmas, nightmares and traumata. Law always seems to be the appropriate universal remedy, a set of standardized signs and practices, which allow negotiating values and interests across otherwise intransitive borders of colonial difference: "Hence the planetary

[25] Hussain, jurisprudence of emergency, 75, 79, 93f.
[26] Ibid., 6.
[27] Elizabeth Kolsky, *A Note on the Study of Indian Legal History*.
[28] John L. und Jean Comaroff, "Reflections on the Anthropology of Law, Governance and Sovereignty", In Benda-Beckmann, Franz und Keebet (eds.), *Rules of Law and Law of Rules. On the Governance of Law*, Ashgate 2009, 31-60; Shalinia Randeria, "De-politicization of Democracy and Judicialization of Politics", in: *Theory, Culture & Society* 24, 2007, 38-44.
[29] Kolsky, *Colonial Justice in British India,* 4; Jürgen Osterhammel, "Anthropologisches zum Freihandel", In Reinhard, Wolfgang; Stagl, Justin (eds.), *Menschen und Märkte. Studien zur historischen Wirtschaftsanthropologie*, Köln 2007, 353-369, at 363.

fight for into a constitutionalism that explicitly embraces heterodoxy in highly individualistic, universalistic Bills of Rights."[30]

In the late 19th century, these universalistic claims contrasted with the heterogeneity of an "era of ambivalences" in British India.[31] The allegedly homogenous *Rule of law* is a product of Western modernity itself. Under the conditions of legal pluralism with its "mobile sovereignties" and "markets of loyalties"[32], the exclusiveness of the *Rule of law* diminished, many of its characteristics changed with a growing need for justification.[33] Consequently, of paramount importance is to analyze what the legal historian Lauren Benton calls "jurisdictional politics", i.e. "conflicts over the over the preservation, creation, nature, and extent of different legal forms and authorities".[34]

Similarly as the combat terms of "rights", "citizenship", "public/private sphere", the "modern" "rule of law" belonged to the major justification narratives of the British Empire, which should legitimate the "modern state" and its institutions in contrast to the "medieval" "oriental despotism" of the Mughal Empire in India.[35]

According to Dipesh Chakrabarty, it is necessary to disentangle these seemingly homogenous justifications and to hand them back to political philosophy and history with all their contradictions, – „in the same way as suspect coins return to their owners in an Indian bazaar" well aware of the fact that the categories of this global currency are no longer to be taken for granted.[36] The Rule of law represented one of the mightiest moral justifications of British imperialism and one of the most visible manifestations of British control and governance[37]: - "we can however, as Peter Fitzpatrick suggest, " take each of the[se] imperative qualities of the rule of law and evoke their opposite ‚in' the rule of law itself."[38] My research project

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[30] Comaroff, *Reflections on the Anthropology of Law*, 33.
[31] Ibid.
[32] Arjun Appadurai,"Sovereignty without Territoriality: Notes on a Postnational Geography", In Low, Setha M./Lawrence-Zúñiga, Denise (eds.), *The Anthropology of Space and Place. Locating Culture*, Oxford 2006, 337–349.
[33] Franz Benda-Beckmann, "Who's afraid of legal pluralism?", In *Legal Pluralism* 47 (2002), 37-82.
Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law", In *Journal of Legal Pluralism* 19, 1981, 1-47; Pamela G. Price, "The "Popularity" of the Imperial Courts of Law: Three Views of the Anglo-Indian Legal Encounter", In Mommsen, Wolfgang J./ Moor, Jaap de (eds.), *European expansion and law. The encounter of European and indigenous law in 19th and 20th-century Africa and Asia*, Oxford & New York 1992, 179-200, 198.
[34] Lauren Benton, *Law and colonial cultures. Legal Regimes in World History 1400-1900*, Cambridge 2002, 11.
[35] Chakrabarty, Dipesh, "Postcoloniality and the Artifice of History: Who Speaks for "Indian" Pasts?", In *Representations* 37 (1992), 1-26, 21f (quotation 22)
[36] Ibid.
[37] Otter, *'A legislating Empire'*, 89-112.
[38] Peter Fitzpatrick, "Tears of the Law: Colonial Resistance and Legal Determination", In O'Donovan, Katherine; Rubin, Gerry R. (eds.), H*uman Rights and Legal History, Essays in Honor of Brian Simpson*, Oxford

focuses on all the „significant moments, when the rule of law … [and its promises of equal treatment,…] were put to the test.“[39] - as Antonie Anghie has shown lately in his study about "*Imperialism, sovereignty and the making of international law"* .[40] The aim is to turn the Rule of law against itself and to explore the discourse of the rule of law as a process of self-reflection and self-inquiry. If the muse of imperial Justice was considered not to be blind, it is worth asking what she saw and how she saw it.

2000, 126-148, at 128; Shalinia Randeria, "De-politicization of Democracy and Judicialization of Politics", In *Theory, Culture & Society* 24, 2007, 38-44.

[39] Fitzpatrick, *Tears of the Law*, 128; for a way of "how the ‚rule of law' can be defied" see also Upendra Baxi, "‚The State's Emissary'. The Place of Law in Subaltern Studies", In Chatterjee, Partha (eds. et al.), *Subaltern Studies VII. Writings on South Asian History and Society*. Delhi 1993, 247-267, at 250

[40] Antony Anghie, *Imperialism, sovereignty and the making of international law*, Cambridge 2008; see also Laura Nader, "Promise or Plunder? A Past and Future Look at Law and Development", In *Global Justice* 7 (2007), Iss. 2, Art. 1.